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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 10

THE UNITED STATES, PETITIONER

v.

OLYMPIC RADIO AND TELEVISION, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 25, 1954
CERTIORARI GRANTED OCTOBER 11, 1954

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 839

THE UNITED STATES, PETITIONER

vs.

OLYMPIC RADIO AND TELEVISION, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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1 In the United States Court of Claims

No. 19–52

OLYMPIC RADIO AND TELEVISION, INC., PLAINTIFF

v.

THE UNITED STATES OF AMERICA, DEFENDANT

Petition

Filed January 14, 1952

To the Honorable, The Chief Judge and Judges of the United States Court of Claims:

The plaintiff, Olympic Radio and Television, Inc., respectfully represents and alleges:

1. The plaintiff is a corporation organized and existing under the laws of the State of New York, having its office and principal place of business at 34–01 Thirty Eighth Avenue, Long Island City, New York. During the taxable year involved plaintiff was engaged in the manufacturing of television and radio receiving sets.

2. In this suit plaintiff seeks to recover from the United States the sum of $148,841.72, being income and excess profits taxes which were erroneously and illegally assessed and collected from
2 the plaintiff by the Collector of Internal Revenue for the Second Collection District of New York for the year 1944, and which was erroneously paid by the plaintiff to the said Collector. In addition, the plaintiff seeks to recover from the United States interest on such amount from the date of such payment and collection.

3. Plaintiff's claim to recover such amount and interest is founded upon the laws of the United States and particularly upon Section 122 of the Internal Revenue Code, and upon Title 28, United States Code, Section 2516. Jurisdiction of this action is vested in the Court of Claims by Title 28, United States Code, Section 1491.

4. Plaintiff kept its books and accounts on the accrual basis and filed its Federal corporation income and declared value excess profits tax returns and excess profits tax return on the same basis using a calendar year. Said returns for the year 1944 were filed on or about March 15, 1945, with the Collector of Internal Revenue for the Second Collection District of New York.

5. Plaintiff paid its excess profits tax liability for the year 1944 to the Collector of Internal Revenue for the Second Collection District of New York on the following dates and in the following amounts:

Date of payment	*Amount of payment*
Mar. 13, 1945	$173,181.81
June 5, 1945	173,181.81
Sept. 7, 1945	138,545.45
Dec. 15, 1945	138,545.45
Total	623,454.52

3 6. Plaintiff filed its Federal corporation income tax return for the calendar year 1946 with the Collector of Internal Revenue for the Second Collection District of New York on or about March 15, 1947. Said return as filed by the plaintiff for the year 1946 disclosed no income tax liability, and reflected a net operating loss for the year 1946 of $324,844.23.

7. Upon the audit of the plaintiff's income tax return for the year 1946, the Bureau of Internal Revenue reduced the net operating loss for the year 1946 to $310,872.60 to which the plaintiff agreed.

8. During the calendar year 1946 plaintiff paid a total of $263,272.80 in excess profits taxes as follows:

Date of payment	*Amount of payment for calendar year 1945*
Mar. 14, 1946	$86,660.81
June 15, 1946	86,660.81
Sept. 12, 1946	86,660.81
Dec. 12, 1946	3,290.37
Total	263,272.80

9. On or about June 11, 1948, plaintiff filed a claim for refund on Form 843 with the Bureau of Internal Revenue, being a claim for refund of income and excess profits taxes for the year 1944 erroneously and illegally assessed and collected by the Collector of Internal Revenue for the Second Collection District of New York in the amount of $191,004.04.

10. More than six months has elapsed since the filing on or
4 about June 11, 1948, of said refund claim, above referred to, during which time the Commissioner took no action with respect to the said claim for refund.

11. The refund claim, above referred to, was based upon the application of Section 122 (d) (6) of the Internal Revenue Code. The refund claim on said Form 843 was computed by adding to the agreed net operating loss for the year 1946 the sum of excess profits taxes actually paid by the plaintiff during 1946.

12. Up until the time of the filing of this complaint, plaintiff has not received any portion of the amount claimed in said refund claim, nor has the plaintiff been credited in any manner for tax purposes or otherwise with any portion of the amount claimed in said refund claim.

13. The assessment and collection of excess profits tax for the year 1944 in the total amount of $148,841.72 was erroneous and illegal.

14. Plaintiff is the sole owner of the claim here asserted and has not made an assignment or transfer of said claim or any part thereof or interest therein.

Wherefore, the plaintiff prays, judgment for the total amount of at least $148,841.72 with interest thereon from the date of payment and such other and further relief to which it may appear the plaintiff is entitled.

EUGENE MEACHAM,
824 Connecticut Avenue NW.,
Washington 6, D. C.

5 In the United States Court of Claims

Answer

Filed May 13, 1952

The United States of America, defendant herein, by its Acting Assistant Attorney General, hereby makes answer to plaintiff's petition as follows:

1. Admits the allegations of paragraph 1.

2. Denies that the income taxes sought to be recovered in this suit were erroneously and illegally assessed and collected from the plaintiff or were erroneously paid by the plaintiff to the Collector of Internal Revenue, and admits the remaining allegations of paragraph 2.

3. Admits the allegations of paragraph 3.

4. Admits the allegations of paragraph 4.

6 5. Admits that plaintiff paid its excess profits tax liability for the year 1944 in the amounts set forth in paragraph 5 and that such amounts were paid on approximately the dates set forth therein.

6. Admits the allegations of paragraph 6.

7. Admits the allegations of paragraph 7.

8. Admits the allegations of paragraph 8.

9. Admits that on or about June 11, 1948, plaintiff filed a claim for refund of income and excess profits taxes for the year 1944,

but denies that such taxes were erroneously and illegally assessed and collected or that plaintiff is entitled to recover on any of the grounds set forth in said claim.

10. Admits the allegations of paragraph 10.

11. Admits that the refund claim was based upon the application of Section 122 (d) (6) of the Internal Revenue Code, but alleges that it is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 11.

12. Admits the allegations of paragraph 12.

13. Denies the allegations of paragraph 13.

14. Alleges that it is without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph 13.

7 Wherefore, defendant prays that plaintiff take nothing from it in this suit and that the same be dismissed.

ELLIS N. SLACK,
Acting Assistant Attorney General.

ELIZABETH B. DAVIS,
Attorney.

8 In the United States Court of Claims

Plaintiff's motion for summary judgment together with supporting affidavit, and exhibit thereto

Filed July 16, 1952

Comes now the plaintiff, Olympic Radio and Television, Inc., and respectfully moves this Honorable Court to enter a summary judgment herein and as grounds thereof refers to the pleadings heretofore filed herein and the accompanying affidavit, all of which are made a part hereof by this reference, which disclose that there is no genuine issue as to any material fact and that the plaintiff is entitled to judgment as a matter of law, pursuant to Rule 51 (a) of the Rules of the United States Court of Claims (revised May 15, 1951).

(S) Eugene Meacham,
EUGENE MEACHAM,
Attorney of Record,
824 Connecticut Avenue NW.,
Washington 6, D. C.

10 *Affidavit in support of motion*

STATE OF NEW YORK,
County of Queens, ss:

Morris Sobin, being duly sworn, deposes and says: that he is Vice President and Treasurer of the Plaintiff above-named in this proceeding; that he was the Treasurer of the Plaintiff during the calendar year 1944 and up to the present time; that on or about June 11, 1948, Plaintiff filed a claim for refund of income and excess profits taxes for the year 1944; that said refund claim was based upon the carry-back of a net operating loss of the Plaintiff from the year 1946 to the year 1944, as computed under the provisions of Section 122 (d) (6) of the Internal Revenue Code; that said refund claim referred to adjustments under Section 122 (d) (6) for amounts representing excess profits taxes paid or accrued during 1946; that in this proceeding the Plaintiff has abandoned its contention with respect to excess profits taxes accrued in the year 1946 in the sum of $86,333.74 and relies solely upon the payment of excess profits taxes during the year 1946 in the sum
11 of $262,272.80; that a copy of said refund claim above-referred to, together with the schedules and computations attached thereto, is attached to this Affidavit; that for the purposes of this proceeding the amount of refund claimed was computed as follows: the supplemental Revenue Agent's Report covering the Plaintiff's operations for the year 1944, dated March 31, 1948, reflected an adjusted net income for 1944 of $308,407.41, after allowance of net operating loss carry-back from 1946 of $310,872.60; the latter figure does not include any additions for excess profits taxes paid during 1946; the Plaintiff actually paid $263,272.80 in excess profits taxes during 1946; if the latter figure is added to the agreed net operating loss for 1946 of $310,872.60 and the aggregate of these two carried back to 1944, net income for 1944 is reduced to $45,134.61 and the adjusted excess profit net income becomes $61,172.43; because of the excess profits credit and unused excess profits credit carry-overs there would result an excess profits tax liability for 1944 of zero; that the remaining excess profits tax assessments (and payments) for the year 1944 not yet recovered by the Plaintiff by way of refund, all of which have been paid to the Collector of Internal Revenue, aggregate $148,841.72, which is the amount claimed as a refund in this proceeding, plus interest.

(S) Morris Sobin.
MORRIS SOBIN.

Subscribed and sworn to before me this 3rd day of July, 1952.

[SEAL] (S) Abraham Cooper,
Notary Public.

ABRAHAM COOPER,
Notary Public, State of New York

No 03-0752550. Qualified in Bronx County.
Cert. filed with Bronx & Queens Co. Clk. & Reg.
Term expires March 30, 1953.

12 *Exhibit to affidavit*

Form 843
Treasury Department
Internal Revenue Service

(Revised January 1946)

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

Collector's stamp: (Date received) June 15, 1948.

☒ Refund or Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

STATE OF NEW YORK,
County of Queens, ss:

Type or print { Name of taxpayer or purchaser of stamps: Olympic Radio & Television, Inc., Successors to Hamilton Radio Corporation.
Business address: 34-01 38th Avenue (Street), Long Island City 1, New York (City).
Residence ----------

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete.

1. District in which return (if any) was filed 2nd New York.

2. Period (if for income tax, make separate form for each taxable year) from 1-1, 1944, to 12-31, 1944.

3. Character of assessment or tax: Income and Excess Profits Taxes.

4. Amount net assessment, $191,004.04; dates of payment, various.

5. Date stamps were purchased from the Government _____.

6. Amount to be refunded, exclusive of interest, $191,004.04.

7. Amount to be abated (not applicable to income, gift, or estate taxes) _____.

8. The time within which this claim may be legally filed expires, under section 322 of I. R. C. (Revenue Act or Internal Revenue Code), on March 15, 1949.

The deponent verily believes that this claim should be allowed for the following reasons:

The net operating loss for 1946 was not adjusted, as required under Section 122 (d) (6), for excess profits taxes paid or accrued during 1946. Taxpayer finally agreed to a deficiency in excess profits taxes (hence these taxes accrued in 1946) of $86,333.74. Moreover, taxpayer actually paid, in 1946, $306,072.41 in excess profits taxes.

OLYMPIC RADIO & TELEVISION, INC.,
(S) (Name illegible), *President.*
M. SOBIN, *Treasurer.*

Sworn to and subscribed before me this 11th day of June 1948.

Abraham Cooper,
ABRAHAM COOPER,
Notary Public, State of New York.

Residing in Bronx County.
Bronx Co. Clk.'s No. 177, Reg. No. 382–C–9.
Certificate filed in Queens Co. Clk.'s No. 3044, Reg. No. 422–C–9.
Commission expires March 30, 1949.

RE: OLYMPIC RADIO TELEVISION, INC.

RECOMPUTATION OF TAXES FOR 1944

Income tax

Net income per RAR		$619,280.01
Loss per RAR, 3/31/48	$310,872.60	
EPT def. agreed in 1946	86,333.74	
		397,206.34
		222,073.67
A. E. P. N. I.		142,008.24
Line X		80,065.43
Tax @ 40%		32,026.17

Excess profits tax

A. N. I. from above		222,073.67
Interest on borrowed capital, '44	$14,876.71	
Interest on borrowed capital, '46	1,161.11	
		16,037.82
		206,035.85
Adj. for 711 (a) (1) (J)		86,333.74
		292,369.59
Spec. Exp	$10,000.00	
E. P. Cr. (RAR-10-18-46)	55,451.34	
Unused E. P. C. (RAR-3-31-48)	84,910.01	
		150,361.35
A. E. P. N. I.		142,008.24
95%		134,907.83
80% of line X, above		64,051.34
Income tax		32,026.17
EPT		32,035.17
10% credit		3,202.52
Net EPT		28,822.65
Inc. tax		32,026.17
Final total tax		60,848.82
Total tax per orig. 1139		191,004.04
Refund due		130,155.22

15 *Defendant's response to plaintiff's motion for summary judgment and defendant's cross motion for summary judgment*

Filed August 12, 1952

Comes now the defendant by its Acting Assistant Attorney General and moves the Court to overrule the plaintiff's motion for summary judgment and to enter summary judgment against the plaintiff and in favor of the defendant in the above-entitled action because the pleadings and the evidence appended to the motions for summary judgment of the respective parties consisting of affidavits and exhibits show that there is no triable issue

as to any material fact and that the defendant is entitled to judgment as a matter of law.

In support of the within motion and in response to the
16 plaintiff's motion for summary judgment, the defendant will rely upon the pleadings and the evidence attached to the motions of the respective parties as well as the brief submitted herewith.

Respectfully submitted.

ELLIS N. SLACK,
Acting Assistant Attorney General.

ELIZABETH B. DAVIS,
Attorney.

CITY OF WASHINGTON,
District of Columbia, ss:

Elizabeth B. Davis, being duly sworn, says:

1. I am an attorney in the Tax Division of the Department of Justice, assigned to duty at Washington, D. C., and that in my official capacity I am counsel of record for the United States, the defendant in a cause of action now pending in the United States Court of Claims, styled and numbered as follows: Olympic Radio and Television, Inc. v. United States, No. 19–52.

2. In my official capacity as counsel of record for the defendant I am at the present time the custodian of the administrative files of the Bureau of Internal Revenue, Treasury Department containing the information, papers and documents in the
17 possession of the defendant relating to the issues involved in the aforesaid proceeding.

3. I have examined the administrative files in my custody and as the result thereof state the following facts which I believe to be true:

(a) That the express profits tax return of the Hamilton Radio Corporation (now the Olympic Radio and Television, Inc.) for the calendar year 1945 showed an excess profits tax liability of $346,643.22.

(b) That of the amount of $346,643.22, payments in a total amount of $261,939.28 were made in 1946 and the remaining amount of $84,703.94 satisfied by credit.

(c) A deficiency of $42,799.61 in excess profits tax and $4,164.46 in interest was assessed on the November, 1947, list, of which $42,799.61 was abated on Schedule IT–CB–8061 (this is the schedule showing allowance of tentative carry-back adjustments), and the balance of $4,164.46 was credited on the same schedule. Additional interest of $38.16 and $789.38 was assessed on June 17, 1947, and April 19, 1948, lists, respectively, and was paid by credit.

(d) That there were carry-back allowances made from 1947 to 1945, resulting in overassessments of 1945 excess profits tax being allowed of $189,642.35 and $199,800.48, or a total overassessment allowed of $389,442.83. The amounts of these overassessments were either refunded or credited during the years 1947 and 1948.

18 (e) The following is a summary of the foregoing assessments and adjustments of 1945 excess profits taxes:

		Excess profits tax
Originally assessed per return		$346,643.22
Deficiency assessed 11/47 (without interest)		42,799.61
Total assessments		389,442.83
Carry-back from 1947	$189,642.35	
Carry-back from 1947	199,800.48	
		389,442.83
Net assessment		None

ELIZABETH B. DAVIS.

Subscribed and sworn to before me this 8th day of August, 1952.

[SEAL] NELLIE G. PLUMLEY,
Notary Public.

19 *Argument and submission of case*

On October 7th and 8th, 1952, the case was argued and submitted on plaintiff's and defendant's motions for summary judgment by Mr. Frederick R. Tansill for plaintiff and by Mrs. Elizabeth B. Davis for defendant.

21 *Opinion of the court on plaintiff's and defendant's motions for summary judgment by Whitaker, J.; dissenting opinion by Madden, J., with which Jones, Ch. J. agrees*

Decided November 4, 1952

Mr. Frederick R. Tansill for the plaintiff. Mr. Eugene Meacham was on the briefs.

Mrs. Elizabeth B. Davis, with whom was Mr. Acting Assistant Attorney General Ellis N. Slack, for the defendant. Mr. Andrew D. Sharpe was on the brief.

OPINION ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

Decided November 4, 1952

WHITAKER, Judge, delivered the opinion of the court:

The plaintiff sues for the recovery of $148,841.72 with interest asserting that the excess profits tax collected from it for the year 1941 was larger, by that amount, than it should have had to pay.

The plaintiff, a manufacturer of radio and television sets, paid in 1945 an excess profits tax on its 1944 profits in the total amount of $623,454.52. In 1946 it paid an excess profits tax of $263,272.80 on its 1945 profits. The plaintiff's return for 1946 showed no income tax liability, but instead a net operating loss of $324,844.23 reduced by the Bureau of Internal Revenue upon audit to $310,872.60. This operating loss for 1946, under the law, could be "carried back" to the year 1944. When this was done, it reduced the plaintiff's excess profits taxes for 1944 from the $623,454.52, which it had paid, to a considerably lesser sum. The amount of that reduction has been received by the plaintiff, by pay-
22 ment or credit. The plaintiff says, however, that to its net operating loss of $310,872.60 for 1946 there should have been added the $263,272.80 which it paid in 1946 on its 1945 excess profits, and that the sum of these two figures, instead of the first figure only, should have been carried back to reduce the 1944 excess profits net income. If that had been done, it would have reduced the 1944 excess profits tax by the amount claimed in this suit.

Section 122 of the Internal Revenue Code, which is entitled "Net Operating Loss Deduction" provides:

"(a) DEFINITION OF NET OPERATING LOSS.—As used in this section, the term net operating loss means the excess of the deductions allowed by this chapter over the gross income, with the exceptions, additions, and limitations provided in subsection (d).

* * * * *

"(d) EXCEPTIONS, ADDITIONS AND LIMITATIONS.—The exceptions, additions and limitations referred to in subsections (a) (b) and (c) shall be as follows:

* * * * *

"(6) There shall be allowed as a deduction the amount of tax imposed by Subchapter E of Chapter 2 paid or accrued within the taxable year."

Subchapter E of Chapter 2 is the part of the Code providing for excess profits taxes. Subsection (b) of Section 122 provides that if the taxpayer has a net operating loss for any taxable year, that net operating loss may be carried back to the two preceding taxable years, to reduce the income for those years.

The plaintiff, relying on the statutes referred to above, says that by Section 122 (d) (6) its excess profits tax paid in 1946 was includible in its "net operating loss" and therefore could be carried back to 1944, the second preceding taxable year, to reduce its income for that year. The Government says that these statutory provisions do not permit the plaintiff to do so, because the plain-

tiff was on the accrual basis for the computation of its income for tax purposes, and the tax which it desires to carry back, though paid in 1946 when the plaintiff had a net operating loss, accrued in 1945 when it did not have a net operating loss, and would not have had such a loss even if this tax had been deducted from its 1945 income. The Government points to Section 43 of the Code which says:

"The deductions and credits * * * provided for in this chapter shall be taken for the taxable year in which "paid or accrued" or "paid or incurred," dependent upon the method of accounting upon the basis of which the net income is computed * * *."

Then it points to Section 23 which says:

DEDUCTIONS FROM GROSS INCOME

"In computing net income there shall be allowed as deductions:

"(s) * * * the net operating loss deduction computed under section 122."

Both Sections 43 and 23 are in Chapter 1 of the Code. Section 48 (c) also contains a definition similar to that of Section 43.

The statutory texts quoted above put a heavy burden on the plaintiff to show that it, being on the accrual basis for tax purposes, could take, in 1946, a deduction of excess profits taxes which accrued in 1945, though they were paid in 1946. The plaintiff's contention is that if the statutory definition of "paid or accrued" is applied to the excess profits tax situation, the deduction which the statute seems to tender to taxpayers is largely illusory, so far as taxpayers on the accrual basis of tax accounting are concerned. This would seem to be true, since it would be only rarely that a taxpayer would accrue a liability for an excess profits tax in a year in which it had a net operating loss.

According to the letter of the statutes, plaintiff is not entitled to deduct in the year 1946 taxes which accrued for the year 1945 but which were paid in 1946. When the statute referred to deductions "paid or accrued" in the taxable year, it referred to deductions paid in the taxable year if the taxpayer was on a cash basis, and to deductions accrued within the taxable year if the taxpayer was on the accrual basis. It is also true that in computing one's income, either one basis or the other must be used, and that one cannot be used for certain deductions and the other for others.

Notwithstanding all this, we think that in order to give effect to the intention of Congress we must permit this taxpayer to deduct excess profits taxes paid in the calendar year 1946, although they accrued for the year 1945. We think so, for this reason: It was the clear intention of Congress that a taxpayer should be permitted to carry back to a former year his loss in a subsequent year,

and that to this loss there should be added excess profits taxes "paid or accrued" in the calendar year.

Now, if we follow the letter of the statute, a taxpayer on an accrual basis would be denied the deduction of excess profits taxes, in practically all cases, if he is limited to the excess profits taxes accrued within the taxable year. There is rarely a case when a taxpayer would be liable for any excess profits tax in a year in which it had sustained a net operating loss; and, yet, Congress certainly intended that it should get the benefit of the deduction of excess profits taxes for some year. In order for it to get this deduction it would seem that it should be entitled to deduct the excess profits taxes which it paid in the taxable year, although they had accrued in the prior year.

It seems to us, therefore, that we must make an exception in this case to the general rule prohibiting the shifting from the "paid" to the "accrued" basis, or vice versa, in the case of specific deductions. Otherwise, we cannot give effect to the plain intention of Congress. We realize this does violence to the letter of the Act, but we are so thoroughly convinced of the intention of Congress that we feel justified in disregarding the letter in order to give effect to that intent. After all, it is the intention of Congress which we must enforce, however that intention may be divined.

No cases exactly in point have been cited to us nor have we found any; however, several of the Courts of Appeal have held that in applying the tax levied on undistributed net income, the expression "paid or accrued" need not be given its customary meaning.

In Birmingham, et al., v. The Loetscher Company, 188 F. 2d 78 (C. A. 8) the court held that a cash basis taxpayer could, under Section 505 (a) (1) of the Internal Revenue Code, deduct both taxes for a prior year paid within the taxable year and taxes accrued but not paid within the taxable year, in determining its undistributed net income for the purposes of the penalty tax on such net income. The court there relied on a holding in Commissioner v. Clarion Oil Company, 148 F. 2d 671, 80 U. S. App. D. C. 41, which, while it permitted a cash basis taxpayer to deduct taxes accrued but not paid within the tax year, refused to permit it to deduct taxes paid within the year but accrued in a prior year. In Aramo-Stiftung v. Commissioner, 172 F. 2d 896 (C. A. 2) the court permitted a cash basis taxpayer to deduct income taxes accrued but not paid within the taxable year, in determining its Section 505 (a) (1) taxable income. See also Wm. J. Lemp Brewing Company, 18 T. C. —, No. 70.

These cases support plaintiff's contention that the definitions of the term "paid or accrued" in sections 43 and 48 (c) should not be applied in all circumstances and regardless of consequences.

The Tax Court in Lewyt Corporation v. Commissioner, 18 T. C. ——, No. 151, has decided the question here involved adversely to plaintiff's contention. We regret that we are unable to agree.

Defendant's motion is denied, and plaintiff's motion for summary judgment is granted. Judgment will be entered in plaintiff's favor against the defendant in the amount of one hundred forty-eight thousand eight hundred forty-one dollars and seventy-two cents ($148,841.72), with interest as provided by law.

It is so ordered.

HOWELL, Judge; and LITTLETON, Judge, concur.

Madden, Judge, dissenting

I think the plaintiff is not entitled to recover. The Birmingham, Clarion Oil Company and Aramo-Stiftung cases, cited in the court's opinion, involved the penalty tax on undistributed profits. To penalize a corporation for not distributing as dividends money which it either does not have, because it pays it out in back taxes during the year, or which prudence would require it to keep, because it will be needed to pay taxes accrued during the year
26 though not payable until the following year, would seem to amount to penalizing sound management. The instant situation presents no comparable pressure of equity against the text of the statutes. The carry-back provision of the statutes does not permit the taxpayer to average its profit and loss experience for a five-year period. It only permits net operating losses, as determined by statutory provisions, to be carried back. To get the advantage of the statute, its requirements should be met. The Tax Court, in Lewyt Corporation v. Commissioner, 18 T. C. ——, No. 151, has decided the same question which is involved in our case, adversely to the plaintiff's contentions. I agree with its decision.

Chief Judge Jones agrees with this dissenting opinion.

27 *Motion for the United States for rehearing*

Filed Dec. 3, 1952

The United States, defendant herein, moves the Court for a rehearing in the above-entitled case for the following reasons:

1. This Court erred in ignoring the plain provisions of Sections 48 (c) and 122 (d) (6) of the Internal Revenue Code in allowing the plaintiff on the accrual basis to increase its net operating loss for 1946 by excess profits taxes which were paid in that year, but were not a proper accrual in that year.

2. The Court erred in making an exception to the general rule, prohibiting the shifting from the "paid" to the "accrual"
28 basis, in order to give effect to what is considered the plain intention of Congress.

3. The Court erred in concluding that it was the intention of Congress to allow a taxpayer on the accrual basis to increase its net operating loss under Section 122 (d) (6) of the Internal Revenue Code by amounts which were not proper accruals in the year of the net operating loss.

4. The Court erred in granting plaintiff's motion for summary judgment and entering judgment for the plaintiff.

Wherefore, the defendant prays that this motion be set for oral argument; that defendant's motion be granted for the reasons set forth above and also in a brief attached hereto; and that judgment be entered in favor of the defendant.

Respectfully submitted.

CHARLES S. LYON,
Assistant Attorney General.

ELIZABETH B. DAVIS,
Attorney.

28A *Motion for the plaintiff in opposition to the motion for the United States for rehearing*

Comes now the plaintiff, through its counsel of record, and respectfully moves this Court to grant this Motion and to deny the defendant's Motion for Rehearing for the following reasons:

1. The Opinion of this Court in the subject proceeding was correct as a matter of law.

2. This Court did not err as alleged in the defendant's Motion.

3. The single issue presented in this proceeding involves a question of law and all facts were either admitted in the pleadings or covered by unopposed affidavits.

4. The defendant had, prior to the filing of defendant's Motion for Rehearing, an opportunity for arguing the issue of law
28B here involved in open Couht and filed a brief in support thereof. The defendant's Brief in Support of this Motion fails to advance any significantly new and different arguments from those already presented to this Court, hence no good purpose would be served by setting this proceeding for reargument.

Wherefore, the plaintiff respectfully prays that this Motion be granted for the reasons set forth in the plaintiff's briefs as heretofore filed, for the reasons set forth in this Court's Opinion as well as for the reasons set forth in the Brief attached hereto; that the defendant's Motion for Rehearing and for oral argument be de-

nied and that this Court's Judgment in this proceeding remain as entered.

Respectfully submitted.

(S) Eugene Meacham,
EUGENE MEACHAM,
Counsel of Record,
824 Connecticut Avenue NW.,
Washington 6, D. C.

29 *Argument and submission of case*

On motion for rehearing

February 3, 1953

On February 3, 1953, the case was argued and submitted on Defendant's motion for rehearing by Mrs. Elizabeth B. Davis for Defendant, and by Mr. Frederick R. Tansill for plaintiff.

31 *Opinion of the Court on defendant's motion for rehearing by Whitaker, J.; Madden, J., and Jones, Ch. J. adhere to the views expressed in their former dissenting opinion*

Decided March 3, 1953

Mr. Frederick R. Tansill for the plaintiff. Mr. Eugene Meacham was on the briefs.

Mrs. Elizabeth B. Davis, with whom was Mr. Acting Assistant Attorney General Ellis N. Slack, for the defendant. Mr. Andrew D. Sharpe was on the briefs.

WHITAKER, Judge, delivered the opinion of the court:

In our opinion on plaintiff's and defendant's motions for summary judgment filed November 4, 1952, we held that the words "paid or accrued" in section 122 (d) (6) of the Internal Revenue Code must be construed as permitting a deduction for excess profits taxes paid in the taxable year in which a loss had been sustained, although the taxpayer filed its returns on an accrual basis; and we accordingly granted plaintiff's motion for a summary judgment.

Defendant has now filed a motion for a rehearing in which it presents a persuasive argument that our decision is wrong, but after careful consideration of defendant's motion and the authorities cited, we adhere to our former opinion.

However, defendant in its motion for a rehearing calls our attention to the provisions of sections 711 (a) (1) and 711 (a) (2) of the Revenue Act of 1940 (54 Stat. 976), to which subsections (J) and (L) were added by sections 210 (a) and 210 (b)

of the Revenue Act of 1942 (56 Stat. 907 and 908), which read in part as follows:

32 EXCESS PROFITS NET INCOME

"(a) TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1939.—The excess profits net income for any taxable year beginning after December 31, 1939, shall be the normal-tax net income, as defined in section 13 (a) (2), for such year except that the following adjustments shall be made:

"(1) EXCESS PROFITS CREDIT COMPUTED UNDER INCOME CREDIT.—If the excess profits credit is computed under section 713, the adjustments shall be as follows:

* * * * *

"(J) NET OPERATING LOSS DEDUCTION ADJUSTMENT.—The net operating loss deduction shall be adjusted as follows:

"(i) In computing the net operating loss for any taxable year under section 122 (a), and the net income for any taxable year under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, * * *.

"(2) EXCESS PROFITS CREDIT COMPUTED UNDER INVESTED CAPITAL CREDIT.—If the excess profits credit is computed under section 714, the adjustments shall be as follows:

"(L) NET OPERATING LOSS DEDUCTION ADJUSTMENT.—The net operating loss deduction shall be adjusted as follows:

"(i) In computing the net operating loss for any taxable year under section 122 (a), and the net income for any taxable year under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, * * *."

In computing the credit which the Act allows to be taken against excess profits net income, subsections (J) and (L) plainly forbid the deduction of the excess profits taxes in question in this case, whether or not they were paid or accrued within the taxable year.

Section 122 (d) (6) of the Internal Revenue Code permits a deduction of excess profits taxes paid or accrued within the taxable year in computing the net operating loss deduction, but when a taxpayer comes to compute his excess profits credit against excess profits net income, he is denied this deduction. The result is that the deduction allowed by section 122 (d) (6) can be used only in the computation of the ordinary corporate income
33 tax and the corporation surtax net income, but it cannot be used in the computation of the excess profits tax.

Plaintiff seems to admit that this is correct where the excess profits tax is computed under section 710 (a) (1) (A) of the Revenue Act of 1942, but it says that it is not correct when the

excess profits tax is computed under section 710 (a) (1) (B) of the Revenue Act of 1942.

Section 710 (a) (1) provides that the excess profits tax shall be the lesser sum computed under subsection (A) and subsection (B). Subsection (A) provides for a tax of 90 per centum of the adjusted excess profits net income, increased to 95 per centum by the Revenue Act of 1943. Subsection (B) provides for a tax which shall be "an amount which when added to the tax imposed for the taxable year under Chapter 1 (other than section 102) equals 80 per centum of the corporation surtax net income, * * *."

Plaintiff says that when it computed its tax under subsection (B), it arrived at a figure which was less than that computed under subsection (A), and, therefore, that the tax to be demanded of it as a tax computed under subsection (B); and then it says that in computing the excess profits tax under subsection (B) it is not prohibited from deducting the excess profits taxes paid or accrued in another year in which it had sustained a loss.

We think this position is sound.

Section 711 (a) provides that the excess profits net income, upon which the excess profits tax is levied, shall be the normal tax net income with the following adjustments:

"If the excess profits credit is computed under section 713, the adjustments shall be as follows: * * * [subsection (1)]."

Subsection (J) (i) provides for the "net operating loss deduction adjustment." It says, "The net operating loss deduction shall be adjusted as follows:"

"(i) In computing the net operating loss for any taxable year under section 122 (a), and the net income for any taxable year under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, * * *."

34 The same restriction is made if the excess profits credit is computed under section 714.

Therefore, when a taxpayer goes to compute his excess profits tax under section 710 (a) (1) (A) he cannot take credit for "any excess profits tax imposed by this subchapter"; and he must pay 95 per centum of his excess profits net income, less the adjustments allowed, which exclude an adjustment for excess profits taxes paid in another year.

However, section 710 (a) (1) provides that if the amount of the excess profits tax computed under subsection (A) is greater than the amount computed under subsection (B), then the taxpayer is required to pay only the amount computed under subsection (B).

So, the taxpayer proceeds to compute its excess profits tax under subsection (B). This subsection provides that the tax is "an

amount which when added to the tax imposed for the taxable year under Chapter 1 (other than section 102) equals 80 per centum of the corporation surtax net income, computed under section 15 or supplement G, as the case may be, but without regard to the credit provided in section 26 (e) (relating to income subject to the tax imposed by this subchapter)."

It will be seen that in computing the tax under subsection (B), the taxpayer is not concerned with its adjusted excess profits net income. What it is concerned with is the tax imposed under Chapter 1, which is the normal corporation tax and the corporation surtax net income. This subsection says that the excess profits tax, as computed under it, is the difference between 80 per centum of the corporation surtax net income and the normal corporation income tax.

When computing the tax under subsection (B), no regard is to be had to the excess profits net income, but only to the ordinary net income and the corporation surtax net income. No one denies that in computing the ordinary net income that the taxpayer is permitted to carry back or forward the net operating loss in another year, which net operating loss includes a deduction for the excess profits tax paid or accrued within the taxable year in which there was a loss. This is also true in the computation of the surtax net income.

Section 711 (a) relates alone to the computation of the ex-
35 cess profits net income; it does not relate to the computation of the ordinary corporate net income nor to the surtax net income; hence, the prohibition therein contained against the deduction of excess profits taxes in a year in which a loss was sustained does not apply when a corporation is computing its ordinary net income or its surtax net income.

Therefore, inasmuch as this taxpayer's tax was computed under section 710 (a) (1) (B) of the Revenue Act of 1942, and since the tax imposed by this section is not based on excess profits net income, the limitation imposed by subdivision (J) (i) of section 711 (a) (1) and subdivision (L) (i) of section 711 (a) (2) is not applicable.

It results that the judgment heretofore entered in the sum of $148,841.72 will stand.

HOWELL, Judge, and LITTLETON, Judge, concur.

MADDEN, Judge, and JONES, Chief Judge, adhere to the views expressed in their former dissenting opinion.

37 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1953

21 Supreme Court of the United States

No. 10, October Term, 1954

THE UNITED STATES, PETITIONER

vs.

OLYMPIC RADIO AND TELEVISION, INC.

Order allowing certiorari

Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.